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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID CHRISTAKES, Plaintiff and Respondent, v. ROBERT EKSTROM et al., Defendants and Appellants.	G039954 (Super. Ct. No. 07CC03933) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Reversed and remanded.

Jeffrey Lewis for Defendants and Appellants.

Keathley & Keathley, Katherine D. Keathley and H. James Keathley for Plaintiff and Respondent.

Robert and Margaret Ekstrom, James and Shendel Haimes, and John and Joanne Schoeffel (hereafter collectively the Ekstrom defendants) appeal the judgment that followed an order granting a special motion to strike[1] the malicious prosecution action filed against them and their attorneys by David Christakes. Although they had filed their own motion, the Ekstrom defendants also filed a notice of joinder in the special motion to strike filed by their attorneys. The trial court allowed the joinder, granted the attorneys' motion, and struck the malicious prosecution complaint based on the attorneys' motion. The trial court subsequently awarded the Ekstrom defendants their attorney fees incurred in preparing the notice of joinder, but denied their attorney fees incurred in preparing their special motion to strike because it had been rendered moot when the court granted the attorneys' motion. We agree with the Ekstrom defendants' contention that the trial court erred and reverse the judgment insofar as it denies them attorney fees incurred in preparing their special motion to strike.

FACTS AND PROCEDURE

We have dealt with this controversy in two prior opinions filed on November 3, 2008. (*Ekstrom v. Marquesa at Monarch Beach* (2008) 168 Cal.App.4th 1111 (*Ekstrom I*); *Ekstrom v. Marquesa at Monarch Beach* (Nov. 3, 2008, G039280) [nonpub. opn.] (*Ekstrom II*).) In the action underlying *Ekstrom I* and *Ekstrom II* (Orange County Super. Ct. Case No. 04CC12264, hereafter sometimes called the Ekstrom action), a group of homeowners (including the Ekstrom defendants) sued their homeowners association, individual members of its board of directors (including Christakes), and its property management company. The plaintiffs contended the

[1] Code of Civil Procedure section 425.16 authorizes a special motion to strike a Strategic Lawsuit Against Public Participation (SLAPP) action, and is referred to as the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

association violated the recorded declaration of conditions, covenants, and restrictions (CC&Rs) by refusing to enforce, as to palm trees, a provision requiring that *all* trees obstructing views be trimmed, topped, or removed. The association's property management company and the individual members of its board of directors, including Christakes, were dismissed from the underlying action following successful demurrers and summary judgment motions. (*Ekstrom I, supra*, 168 Cal.App.4th at p. ---, fn. 3.) In *Ekstrom I*, we affirmed the judgment in favor of the homeowners compelling the association to enforce the CC&Rs as to palm trees. *Ekstrom II* concerned the postjudgment order awarding attorney fees to the homeowners.

Christakes filed and served this malicious prosecution action in March 2007. As relevant to this appeal, the defendants in the Christakes' action were the plaintiffs and their attorneys in the Ekstrom action aligned as follows: (1) the Ekstrom defendants; (2) Enterprise Counsel Group, and attorneys Benjamin P. Pugh and David A. Robinson (hereafter collectively the ECG defendants); and (3) and other defendants in this action (i.e., additional plaintiffs in the Ekstrom action) who are not parties to this appeal.

On May 8, 2007, the ECG defendants filed a special motion to strike Christakes' complaint. They argued filing the Ekstrom action was protected activity within the meaning of the anti-SLAPP law. Christakes could not demonstrate a probability of prevailing because there was probable cause to name Christakes in the action, Christakes had not obtained a favorable termination on the merits, and Christakes could produce no evidence the ECG defendants acted with malice. The ECG defendants' special motion to strike was supported by several declarations from attorneys Pugh and Robinson and from the Ekstrom defendants.

On May 25, 2007, the Ekstrom defendants filed a separate special motion to strike. The Ekstrom defendants' points and authorities raised the same arguments as made by the ECG defendants and asserted as separate grounds for concluding Christakes

could not prevail: (1) they had relied on the advice of counsel in naming Christakes in the underlying action; (2) there was no evidence of malice on the part of the individual Ekstrom defendants; and (3) Christakes could not prove damages as the association's insurance carrier had paid all Christakes' legal bills. They asked the court to take judicial notice of the declarations filed with the ECG defendants' motion. On June 14, 2007, the Ekstrom defendants filed a two-page notice of joinder in the ECG defendants' special motion to strike, and in the special motion to strike filed by another group of defendants.

The special motions to strike were heard on August 24, 2007. In its minute order, as to the ECG defendants' motion, the court concluded the complaint arose out of protected activity and Christakes had failed to establish a probability of prevailing because he failed to show the action was initiated or maintained with malice. The court granted the Ekstrom defendants' joinder in the ECG defendants' motion, granting their special motion to strike for the reasons stated in the ECG defendants' motion. The court declared the Ekstrom defendants' separate special motion to strike moot. On October 3, the court entered an order granting the Ekstrom's special motion to strike based on their joinder in the ECG defendants' motion. The court ruled the various defendants' requests for attorney fees could be addressed by a separate motion.

The Ekstrom defendants subsequently filed their motion seeking $26,926.69 in attorney fees and costs incurred in connection with preparing their special motion to strike and the joinder in the ECG defendants' special motion to strike. The court awarded only $7,845, which included two hours for preparing the notice of joinder in the ECG defendant's motion, four hours for attending the hearing on the special motions to strike, two hours for preparation of orders, and 11 hours for preparing the attorney fees motion.[2]

[2] The Ekstrom defendants filed a motion to augment the record on appeal on July 18, 2008. We previously granted the motion as to exhibit No. 1 attached to the motion (judgment entered Feb. 21, 2008), and ordered the motion as to the remaining items would be decided in conjunction with the decision on appeal. The motion is

The trial court declined to award the Ekstrom defendants any of the attorney fees incurred in preparing their separate special motion to strike. At the hearing, the court acknowledged it was proper for the Ekstrom defendants' to have brought a separate motion because they presented independent grounds for striking Christakes' complaint. The court also concluded the amount of attorney fees the Ekstrom defendants incurred in preparing the separate motion was reasonable. But the court concluded it had no legal authority to award fees incurred in preparing the separate special motion to strike because once the court had granted the ECG defendants' motion in which they had joined, their own motion became moot. Thus, they did not prevail on their separate motion and there was no basis for attorney fees under section 425.16, subdivision (c).

DISCUSSION

The Ekstrom defendants contend the trial court erred by concluding the award of attorney fees could not include attorney fees incurred in preparing their separate special motion to strike. We agree.

Christakes correctly points out the usual standard of review for an award of attorney fees is abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) But when, as here, we are considering whether the trial court had the *authority* to award attorney fees, we are presented with an issue of law that is reviewed de novo. (*Ibid.*)

The trial court incorrectly concluded it had no authority to include in the attorney fees award to the Ekstrom defendants the fees incurred in preparing their separate special motion to strike. Section 425.16, subdivision (c), provides, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." "Section 425.16, subdivision (c), is intended to compensate a defendant

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unopposed. The motion to augment is GRANTED as to the remaining items attached to the motion: exhibit No. 2 (minute order dated May 9, 2008, directing preparation of amended proposed judgment), and exhibit No. 3 (amended judgment entered July 7, 2008). Those documents are deemed part of the record on appeal.

for the expense of responding to a SLAPP suit. [Citation.] To this end, the provision 'is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extracting herself from a baseless lawsuit.' [Citation.]" (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 22 (*Wanland*).)

While section 425.16, subdivision (c), does not authorize an award of attorney fees incurred with respect to the entirety of the litigation (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383), fees may be recovered for work performed in *connection* with obtaining an order striking the complaint as a SLAPP. For example, in *Wanland, supra,* 141 Cal.App.4th at pages 21-23, defendant was entitled to an award that included attorney fees for a challenge to the undertaking that had been submitted to stay enforcement of the attorney fees award. In *Metabolife Intern., Inc. v. Wornick* (S.D.Cal. 2002) 213 F.Supp.2d 1220, 1223-1224, footnote 1, the award included attorney fees incurred in bringing a motion to dismiss on grounds of lack of jurisdiction, improper venue, and under the anti-SLAPP statute, where federal law required all such grounds to be asserted simultaneously.

Courts have concluded the preference for compensating defendants who are successful in utilizing the special motion to strike is so strong that attorney fees may be awarded even if the defendant was only partially successful. For example, in *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 339 (*Mann*), the court explained: "Given the express legislative preference for awarding fees to successful anti-SLAPP defendants, a party need not succeed in striking every challenged claim to be considered a prevailing party within the meaning of section 425.16. A contrary conclusion would require a partially prevailing defendant to bear the entire cost of the anti-SLAPP litigation at the outset of the case. This would create a strong disincentive for a defendant to bring the motion, undermining the legislative intent to encourage defendants to utilize the anti-SLAPP procedure to eliminate SLAPP claims and to

discourage plaintiffs from bringing meritless SLAPP claims. [Citation.]" The *Mann* court concluded "a party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." (*Id.* at p. 340.)

This is not a case in which the Ekstrom defendants achieved only an "illusory victory[.]" (See *Moran v. Endres* (2006) 135 Cal.App.4th 952, 953-955.) The Ekstrom defendants joined in the special motion to strike filed by the ECG defendants. We note there is disagreement as to whether joinder in such a motion is effective. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1391 [joinder a nullity because it did not place the joining party before the court in connection with affirmative relief sought in the motion], cf. *Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660-661 [client may properly join special motion to strike filed by attorneys in malicious prosecution case, particularly where client specifically requests affirmative relief].)

Here, the Ekstrom defendants took a "belt and suspenders" approach joining in the ECG defendants' motion and filing a separate motion on the same grounds and two others. The trial court specifically noted it was proper for them to join in the ECG defendants' motion (because they specifically requested affirmative relief) *and* proper for them to also file a separate motion because they had defenses the ECG defendants lacked (e.g., advice of counsel and lack of evidence of malice). Nonetheless, the trial court denied the Ekstrom defendants their fees incurred in preparing their motion solely because it granted the ECG defendants' motion first, rendering their motion moot. But the fees incurred in preparing their separate motion were incurred by the Ekstrom defendants in connection with prevailing on the motion to strike and should have been allowed.

Christakes suggests that had the court considered the Ekstrom defendants' motion on its own merits it would have been denied. He points to a comment made by the trial court at the hearing on the special motions to strike suggesting the Ekstrom defendants' motion was deficient because they offered no evidence. They asked the court to take judicial notice of the declarations (including their own) filed with the ECG defendants' motion, but did not incorporate the evidence by reference into their motion. But it was not the Ekstrom defendants' burden to come forward with any evidence. They were only required to demonstrate Christakes' action arose out of protected First Amendment activity—a malicious prosecution action qualifies for treatment under section 425.16 as a matter of law. (*Barak, supra,* 135 Cal.App.4th at p. 691.) It was not necessary for the Ekstrom defendants to present evidence to shift the burden to Christakes to demonstrate he had a probability of prevailing. (*Ibid.*)

Christakes also contends the Ekstrom defendants were required to appeal "from the order denying their [special motion to strike]" to preserve the attorney fees issue. He cites no authority in support of that proposition. There is no order denying the Ekstrom defendants' motion, the court simply never ruled on it as it deemed the motion moot. The court specifically reserved the issue of attorney fees, to be addressed by a separate noticed motion. The court's attorney fees order is a separately appealable order. (*Johnston v. Corrigan* (2005) 127 Cal.App.4th 553, 556.)

Although we agree the trial court erred in declining to award the Ekstrom defendants any attorney fees incurred in preparing their special motion to strike, we decline their invitation to simply award them the full amount they requested. The trial court is in a better position to determine reasonable attorney fees on remand. (See *Phelps v. Stostad* (1997) 16 Cal.4th 23, 33, fn. 7.)

DISPOSITION

The judgment is reversed insofar as it denies the Ekstrom defendants attorney fees incurred in preparing their special motion to strike. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for further proceedings consistent with this opinion. The Ekstrom defendants are awarded their costs on appeal.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.